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No. 83-2166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PHILIP Q. ZAUDERER,

Appellant,

—v.—

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, IN SUPPORT OF APPELLANT

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION

The American Civil Liberties Union and the American Civil Liberties Union of Ohio Foundation respectfully move, pursuant to Rule 36.3 of this Court's Rules, for leave to file the attached brief *amici curiae*. Counsel for Appellant, Philip Q. Zauderer, has consented to the filing of this brief and his letter of consent has been filed with the Clerk. *Amici* have been unable to obtain the consent of the Office of Disciplinary Counsel of the Supreme Court of Ohio.

The American Civil Liberties Union (ACLU) is a national organization comprising more than 250,000 members. The American Civil Liberties Union of Ohio Foundation (ACLU of Ohio) is the

Ohio affiliate of the ACLU. The ACLU and its affiliates have been traditionally devoted to the protection and enhancement of fundamental liberties and basic civil rights.

Among the most fundamental of rights within our American society are the rights to speak and to hear, as guaranteed by the First Amendment. This Court has on numerous occasions held invalid governmental restrictions upon communications where the interests of speakers and listeners have been subject to undue infringement.

The instant controversy, involving the constitutionality of Ohio's rules governing attorney advertising, raises significant issues concerning the extent to which a state may impede the flow of truthful and accurate information concerning legal rights and services to

members of the public through broad speech prohibitions on attorney advertising. Amici believe that those rules significantly impair the ability of members of the public to gain access to information necessary to recognize legal problems, select an attorney, and, ultimately, assert and protect their legal rights. It is the position of amici that Ohio's attorney advertising rules impermissibly abridge the First Amendment rights of attorneys to disseminate, and members of the public to receive, such information. Amici respectfully submit this brief to advance their position to this Court.

Respectfully submitted,

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INTEREST OF AMICI

The interest of amici, the American Civil Liberties Union and its affiliate American Civil Liberties Union of Ohio Foundation, has been set forth in the Motion for Leave to File Brief Amici Curiae.

STATEMENT OF FACTS

On June 29, 1982 a disciplinary Complaint was filed by the Office of the Disciplinary Counsel of the Supreme Court of Ohio against Appellant, Philip Q. Zauderer, following his publication of two legal service advertisements. The first advertisement related to his availability for representation of individuals charged with driving while intoxicated. That advertisement appeared in one newspaper for two days, and Mr. Zauderer accepted no employment as a consequence of it.

The second advertisement related to Mr. Zauderer's availability for representation of women who had sustained injuries from the use of an intrauterine birth control device known as the "Dalkon Shield". It contained a diagram of the Dalkon Shield and provided the following information: (a) the Dalkon Shield had been alleged to have caused serious injuries; (b) it may not have been too late to take legal action against the Dalkon Shield's manufacturer; (c) Mr. Zauderer's firm was representing women in such cases; and (d) fees for Mr. Zauderer's representation were payable on a contingent basis. The Dalkon Shield advertisement did not state Mr. Zauderer's contingent fee rates and did not describe potential litigation costs.

The Board of Commissioners on Grievances and Discipline ("Board"), the body designated to receive disciplinary complaints, recommended that Mr. Zauderer be indefinitely suspended from the practice of law, based upon several findings concerning the Dalkon Shield advertisement, including that: (a) use of the Dalkon Shield diagram violated the illustration ban of DR 2-101(B); (b) the advertisement was an implicit **self-recommendation** of employment in violation of DR 2-103(A); (c) Mr. Zauderer, through the advertisement, gave unsolicited legal advice and, therefore, his acceptance of employment violated DR 2-104(A); (d) failure to include specific cost information was misleading in violation of DR 2-101(A); and (e) failure to state

specific fee rates was a violation of DR 2-101(B)(15). The Supreme Court of Ohio affirmed the Board's findings* but declined to suspend Mr. Zauderer from the practice of law, and instead principly reprimanded him.

SUMMARY OF ARGUMENT

The right to receive information is a fundamental tenet of the First Amendment guaranty of free speech. Nowhere is that right deserving of greater protection against undue infringement than in cases involving

* The Ohio court also affirmed the Board's finding that the first advertisement, which offered fee refunds upon conviction of driving while intoxicated, was misleading because no statements were made concerning fees payable upon conviction of a lesser offense. However, since Mr. Zauderer accepted no employment from that advertisement, no person was found to have been misled. That advertisement was not held to have violated any other prohibition, and, therefore, is not further addressed herein.

restrictions upon communications concerning the availability of legal representation.

Challenged in this case is the application of certain of Ohio's attorney Disciplinary Rules to legal service advertising, DR's 2-101(A) and (B), 2-103(A) and 2-104(A). Amici believe that those Rules, as applied, violate the First Amendment rights of the public to receive and attorneys to disseminate meaningful legal services information.

In this case, the Supreme Court of Ohio has determined that advertisements which implicitly recommend an attorney for employment violate DR 2-103(A). Since virtually all legal service advertisements implicitly recommend employment of the advertising attorney, the effect of the court's decision is to prohibit attorney advertising in Ohio.

The Ohio court has further determined that advertisements which suggest the existence of legal rights are not permitted by DR 2-101(B) and DR 2-104(A). Information which concerns legal rights is noncommercial in the hands of its recipients and may not be restricted in the absence of a compelling state interest. No such interest has been demonstrated in this case.

Even if legal rights information could be considered commercial in nature, the prohibitions of DR 2-101(B) and DR 2-104(A) may not stand in the absence of a substantial state interest. No substantial interest exists in this case.

DR 2-101(B) prohibits the publication of any information in a legal services advertisement other than that expressly permitted by its

provisions. That Rule is incapable of any application which would not constitute an impermissible infringement of First Amendment rights and is, therefore, facially overbroad.

The requirements of DR 2-101(A) and DR 2-101(B)(15), as applied, prohibit advertising attorneys from disclosing that legal fees are payable on a contingency basis, unless specific fee rates and incidental costs are further disclosed. Such requirements are inappropriate where fees and costs may vary significantly. Information concerning the time and manner of fee payment is important to those in need of legal services, and its conveyance should not be impeded by restrictions which couple the right to disseminate it with an unrealistic requirement of full fee and cost disclosure.

Amici believe that DR's 2-101(A) and (B), 103(A) and 104(A), as applied below, create serious impediments to the receipt of meaningful information concerning legal services and legal rights, in violation of the First Amendment rights of the public and attorneys. Amici, therefore, urge the adoption of a false and misleading standard for the regulation of legal service advertising which gives due regard to both the inherent limitations of advertising and the capabilities of the public to appreciate those limitations.

ARGUMENT

Introduction.

At issue in this case is whether DR 2-101(A) and (B), DR 2-103(A) and DR 2-104(A), as applied, impermissibly restrict communication through legal service advertising.[1] Those Rules create substantial impediments to the flow of information between attorneys and members of the public in two respects. First, DR 2-101(B), the exclusive list Rule, DR 2-103(A), the anti-recommendation Rule, and DR 2-104(A), the anti-solicitation Rule, operate to limit the public's access to information which is essential for the recognition of legal problems and the

---

1 The full texts of DR 2-101(A) and (B), DR 2-103(A) and DR 2-104(A) are set forth in the Appendix.

informed selection of an attorney. Second, DR 2-101(A), the false and misleading standard, and DR 2-101(B)(15), the fee publication Rule, as applied below, require the dissemination of specific commercial information relating to legal representation prior to an opportunity for an attorney to assess the unique needs of potential clients.

Thus, the Ohio Rules restrict the flow of valuable noncommercial information to the public while compelling the premature dissemination of specific commercial information. For the reasons discussed below, those Rules cannot withstand challenge under the First and Fourteenth Amendments of the United States Constitution.

I. THE SPEECH PROHIBITIONS OF DR 2-101(B), DR 2-103(A) AND DR 2-104(A), AS APPLIED TO ADVERTISING, VIOLATE THE FIRST AMENDMENT RIGHTS OF APPELLANT TO DISSEMINATE, AND THE PUBLIC TO RECEIVE, INFORMATION.

The impact of Ohio's exclusive list, anti-recommendation and anti-solicitation Rules, as applied, upon the public's access to legal service information is far reaching. Ostensibly, those Rules are designed to assist members of the public in the process of attorney selection and recognition of legal problems, while shielding against abusive or coercive attorney misconduct. See EC 2-1 to EC 2-15, appended hereto. However, as applied, the Ohio Rules impermissibly infringe First Amendment rights while standing as a substantial barrier to acquisition of the type of information necessary for

the recognition of legal problems and the informed selection of an attorney.

A. DR 2-103(A), As Applied Below, Violates the Protected Right of Members of the Public to Receive Legal Services Information Through Advertising.

The constitutional guaranty of free speech is one designed to protect and preserve the process of exchange of information and ideas. It is a guaranty which reflects a basic trust and faith in the capabilities of our citizens to assimilate and act upon information for the benefit of themselves and others within the confines of an ever-changing, but civilized society. Thus, the First Amendment is concerned not merely with the right of a speaker to utter words, but more basically, the right of listeners to hear those words.

This Court has long recognized the "right to hear" as a fundamental tenet

of the First Amendment guaranty of free speech. As stated in Martin v. City of Struthers, 319 U.S. 141, 143 (1943): "[i]t is now well established that the Constitution protects the right to receive information and ideas." Moreover, the right to hear has been recognized in a variety of contexts encompassing the broad spectrum of both messages and media. See, e.g., FCC v. League of Women Voters, ___ U.S. ___, 52 LW 5008, 5012 (July 2, 1984) (messages through broadcast editorials); Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977) (legal service prices through print media advertising); Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972) (political messages through in-person lectures).

The right to hear does not exist merely as an incident to the right to

speak. It is a constitutionally independent right, deserving of independent protection against unwarranted restrictions upon its exercise. See Kleindienst v. Mandel, 408 U.S. at 762-764 (in which this Court was called upon to balance governmental interests in regulating immigration against the First Amendment rights of American listeners to hear the words of an alien speaker who was, himself, without a First Amendment right to speak).

Notwithstanding the constitutional independence of the rights to hear and to speak, their exercise may be inextricably linked -- a restriction on one necessarily impinges upon the other. See, e.g., Linmark Assocs. v. Township of Willingsboro, 431 U.S. 85, 96-97 (1977) (holding ordinance prohibiting posting of residential "For Sale" signs

to be an impermissible infringement of both the right to convey and the right to receive available housing information). Therefore, any interest which a state may have in restricting speech must be measured against not only the First Amendment rights of a speaker to speak, but also the independent rights of listeners to hear. Only where the governmental interest outweighs both the right of a speaker and the right of his listeners may a restriction on speech withstand constitutional challenge. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-757 (1976).

It is well established that members of the public have a First Amendment right to receive information concerning products and services through advertising. See, e.g., Bolger v. Youngs Drug

Products Corp., ____ U.S. ____, 103 S. Ct. 2875, 2884-85 (1983) (birth control product information); Bates v. State Bar of Arizona, 433 U.S. at 365 (legal service price information); and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 770 (prescription drug price information). Implicit in the decisions recognizing that right is a realization that advertising serves as one of the most readily accessible sources of information for all members of the public. Thus, to the extent that DR 2-103(A) precludes advertising because of an implicit self-recommendation of employment, it impermissibly violates the right of the public to receive legal services information through advertising. See Bates v. State Bar of Arizona, supra. As earlier stated, virtually

every advertisement carries with it an implicit self-recommendation.

B. DR 2-101(B) And DR 2-104(A) Impose Impermissible Restrictions Upon the Noncommercial Consent of Advertising.

Beyond the question of whether Ohio's anti-recommendation Rule may be applied in a manner which wholly precludes advertising is the question of the extent to which the exclusive list and anti-solicitation Rules may be employed to limit content. In Bates, this Court held that a state may not constitutionally prohibit attorneys from advertising "the prices at which certain routine services will be performed." 433 U.S. at 367-368 (emphasis in original). Although acknowledging that states have substantial interests in the regulation of false, deceptive or misleading advertising, the Court held

that such interests could not justify content restrictions upon advertisements which inform the public of the nature, availability and cost of legal services. Thus, the Court stated:

> [O]ur cases have long protected speech even though it is in the form of a paid advertisement . . . .
>
> * * *
>
> The listener's interest is substantial: The consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant social interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. * * * And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. * * * In short, such speech serves individual and societal

> interests in assuring informed and reliable decision-making.

Id. at 363-364.

Bates is of great importance in assessing the content restrictions of Ohio's exclusive list and anti-solicitation Rules and points squarely toward their constitutional invalidity. However, the restrictions of those Rules extend far beyond restrictions upon the dissemination of commercial price information considered in Bates. As applied to the Dalkon Shield advertisement, those restrictions focus directly upon the dissemination and receipt of information touching upon the nature and existence of legal rights -- i.e., a diagram which depicts a birth control device suspected of causing serious injuries among its users [prohibited by DR 2-101(B)]; a suggestion that the

manufacturer of that device may be legally accountable for such injuries [prohibited by DR 2-101(B) and DR 2-104(A)]; and a suggestion that there are time constraints upon an injured user's right to seek redress for her injuries [prohibited by DR 2-101(B) and DR 2-104(A)].

The exclusive list and anti-solicitation Rules, as applied below, operate as nothing less than content restrictions upon noncommercial speech. The direct effect of those Rules is to eliminate advertising as a vehicle through which members of the public may receive noncommercial information touching upon the nature and existence of legal rights, while permitting the dissemination of purely commercial information. In so doing, those Rules invert the constitutionally established

priorities afforded as between commercial and noncommercial speech, to the detriment of the very public they were intended to serve. For those Rules interfere not only with the public's right to receive noncommercial information bearing upon the existence of legal rights, but ultimately, all other rights which are dependent upon the receipt of such information -- not the least of which is the right to seek redress through the courts. See United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971) (right to obtain meaningful access to the courts impermissibly impaired by prohibition against union recommendations of selected attorneys to members); United Mine Workers of America v. Illinois State Bar Ass'n., 389 U.S. 217 (1967) (rights to seek redress and to associate

impermissibly impaired by restriction on dissemination of information concerning legal rights).

The cases of this Court "have consistently accorded noncommercial speech a greater degree of protection [against governmental restriction] than commercial speech." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 513 (1981). Thus, while content restrictions on noncommercial speech have been upheld "only in the most extraordinary circumstances," content restrictions on commercial speech have been subject to a lesser degree of scrutiny. Bolger v. Youngs Drug Products Corp., 103 S. Ct. at 2879.

"[T]he degree of protection afforded by the First Amendment depends upon whether the activity sought to be regulated constitutes commercial or

noncommercial speech." Id. However, the process of classification may become complex where speech contains both commercial and noncommercial elements -- particularly where the values to the speaker and his listeners of the information passing between them are not equivalent. In such instances, it is necessary to identify with precision those elements of the speech which are the target of governmental restriction and to further determine whether the speech is noncommercial from the perspective of either the speaker or his listeners. Where the intended beneficiaries of a speech restriction are 'listening' members of the public, the focus upon the nature of the restricted speech should be from their perspective. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer

Council, Inc., 425 U.S. 748, 756-757; Lamont v. Postmaster General, 381 U.S. 301 (1965). For rarely will members of that public be in a position to assert First Amendment rights to receive information if they are unaware of the existence of information as a consequence of a speech restriction designed and tailored to prevent its receipt.

The Dalkon Shield advertisement clearly contains both commercial and noncommercial elements. Thus, a careful examination of the joint operation of Ohio's exclusive list and anti-solicitation Rules as applied to that advertisement is essential "to insure that speech deserving of greater constitutional protection [than that afforded commercial speech] is not inadvertently suppressed." Bolger v.

Youngs Drug Products Corp., 103 S. Ct. at 2880.

Neither the exclusive list restriction of DR 2-101(B) nor the solicitation prohibition of DR 2-104(A) prohibits the publication of 'a commercially motivated advertisement for the services of a particular attorney.' Were that the case, one might well conclude that the speech sought to be restricted by those Rules is that which relates only to the commercial interests of the speaker and his listeners. Id. Paradoxically, DR 2-101(B) contemplates commercial speech, permitting the dissemination of a significant amount of commercial information through advertising, while prohibiting, directly and in tandem with the anti-solicitation Rule, virtually every type of noncommercial message which touches or concerns the

nature and existence of legal rights or the particular suitability of an attorney to assist in the assertion of such rights. Thus, with full sanction of Ohio's exclusive list Rule, an attorney may identify areas of law in which he is "available" to practice, but may not describe the types of rights with which those areas of law are concerned; he may state his age and the date of his admission to the bar, but not the length, extent or nature of his experience in dealing with particular kinds of legal problems; he may identify his scholastic distinctions, written publications, professional associations, and offices held, but may not identify the type of clients he represents. In short, an attorney may publish, in an advertisement, a substantial amount of purely promotional, commercial informa-

tion which gives the impression of stature and prestige within the profession and community, but may not publish information which identifies and describes the nature of the legal problems with which he deals -- regardless of how truthful and accurate the information may be.

The specific target of the prohibitions of Ohio's exclusive list and anti-solicitation Rules, as applied to the Dalkon Shield advertisement, is the noncommercial information included in that advertisement. It was the inclusion of information touching upon the nature and existence of legal rights and remedies which led the court below to find a violation of the anti-solicitation Rule. It was the inclusion of a diagram which visually described a factual prerequisite to particular

legal rights and remedies -- i.e., injury resulting from use of the Dalkon Shield -- which led the court to find a violation of the exclusive list Rule.

Even if information concerning the parameters of legal rights were viewed, from the perspective of an advertising attorney, as nothing more than a tool of his or her commercial trade, such information could hardly be characterized as commercial in the hands of the listening public. For in such hands information touching upon the nature and existence of legal rights is not a tradeable commodity, but rather a foundation for both evaluating the boundaries of permissible individual conduct within our society and preserving or restoring those boundaries from violation.

The mere fact that one might choose to retain an attorney who has published

information concerning specific legal rights does not render such information commercial. The recipient's interest in that information extends far beyond the mere formation of a commercial relationship with the attorney, to an interest in the assertion and protection of legal rights. It is, therefore, anomolous that although one has a right to receive noncommercial information concerning legal rights, he may not employ the attorney who conveys such information through an advertisement as a consequence of the restriction imposed by the anti-solicitation Rule, but rather must identify and seek the services of some other attorney with suitable expertise. As recognized by this Court in Bates:

> "[T]he middle 70% of our population is not being reached or served adequately by the legal profession. * * * Among the reasons for this under-

> utilization is . . . an inability to locate a suitable lawyer."
>
> 433 U.S. at 376 (emphasis added).

Although a state may impose reasonable "time, place and manner" restrictions upon noncommercial speech, it may not regulate the content of such speech in the absence of a compelling justification, such as an imminent threat to the public well being. See, e.g., Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (in which this Court stated that a state may not prohibit speech which advocates violence unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action"). Moreover, once a state opens a particular channel of communication to commercial speech, it may not restrict the use of

that channel to preclude noncommercial speech by characterizing such restriction as nothing more than one upon time, place and manner. See Metromedia, Inc. v. City of San Diego, 453 U.S. at 515-516. Under such circumstances it is the noncommercial content which subjects the speech to restriction rather than the time, place or manner of its publication. Id.

In this case, there exists no compelling justification for the blanket prohibitions of Ohio's exclusive list and anti-solicitation Rules as applied to the noncommercial content of advertising -- particularly since those Rules permit the dissemination of a substantial amount of purely promotional, commercial information. Although the State does have a substantial interest in protecting the public from false and

misleading information, that interest cannot justify the overbroad speech prohibitions contained in the Ohio Rules.

The exclusive list restriction of DR 2-101(B), applied in conjunction with the anti-solicitation prohibition of DR 2-104(A), precludes advertising as a vehicle for the dissemination of truthful noncommercial information, while permitting advertising to be used for the dissemination of commercial information. Such restrictions cannot withstand constitutional challenge.

C. The Content Restrictions of DR 2-101(B) and DR 2-104(A) Impermissibly Impede the Flow of Commercial Information.

Even if the content of the Dalkon Shield advertisement were characterized as purely commercial, the restrictions of DR 2-101(B) and DR 2-104(A), as applied, fail to withstand constitu-

tional challenge. It is well settled that commercial advertising enjoys a measure of First Amendment protection against content regulation. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748; and Bigelow v. Virginia, 421 U.S. 809 (1975). The degree of that protection "turns on the nature of both of the expression and of the governmental interests served by its regulation," as measured by four successively applied criteria: (a) whether the advertisement concerns a lawful activity, and is not misleading; (b) whether a substantial governmental interest exists in regulating the content of the advertisement; (c) whether the content regulation directly advances the governmental interest; and (d) whether the content regulation is

more extensive than necessary to serve the governmental interest. Central Hudson Gas & Elec. Corp. v. Public Service Comm., 447 U.S. 557, 563 (1980).

There is clearly nothing unlawful or misleading about information which accurately describes the basis and nature of a legal right. In the context of advertising, such information is valuable in the identification of legal problems and the selection of a suitable attorney. Thus, the validity of the blanket speech restrictions of Ohio's exclusive list and anti-solicitation Rules, as applied below, turns upon whether some substantial state interest is directly advanced.

Among the interests which have been advanced by the State are those of: (1) protection of the public from inaccurate, misleading or deceptive

information (Brief for Appellee in Opposition to Jurisdiction at 7); (2) assurance that the private bar will support and assist in the policing of attorney misconduct (id.); (3) protection of the public from its own lack of sophistication (id. at 7-8); and (4) the provision of an enforcement mechanism which will obviate the need to assess the veracity of information conveyed to the public (id. at 8). But none of these asserted interests prove substantial enough to justify the broad restrictions imposed by DR 2-101(B) and DR 2-104(A).

No dispute exists as to the importance of insuring that the public receives accurate information and of protecting against attorney misconduct. See Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447 (1978). However, those

interests are not served by Rules which prohibit the dissemination, through a public medium, of the very information which is essential for the informed selection of a suitable attorney -- the description of legal problems and nature of the attorney's practice -- while permitting the dissemination of information which creates little more than a generalized impression of stature, prestige and expertise.

Underlying the prohibitions of Ohio's exclusive list and anti-solicitation Rules is the premise that publication of information concerning legal rights in tandem with purely commercial information is inherently harmful to the public. Thus, the State has asserted that "advertising by attorneys is not a reliable process for conveying accurate information to the

public" in light of an advertising attorney's pecuniary interest in attracting clients having the types of legal problems with which he or she deals. (Brief for Appellee in Opposition to Jurisdiction at 8). In essence, the State has suggested that any attorney who has an economic interest in conveying information will be motivated to convey inaccurate, misleading or deceptive information. Such suggestion implies little more than a very serious and unwarranted distrust in the ethical commitment of all attorneys who expect compensation for their services. This Court, in no uncertain terms, rejected a similar assertion made in Bates v. State Bar of Arizona, 433 U.S. at 379, stating:

> It is at least somewhat incongruous for the opponents of advertising to extol the

> virtues and altruism of the legal profession at one point, and, at another, to assert that its members will seize the opportunity to mislead and distort. We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward.

There is nothing inherently wrong in the existence of some profit motive on the part of attorneys whose livelihood is the practice of law. It simply does not follow that an attorney who has an economic interest in advertising his or her services will engage in unethical or unprofessional conduct. As recognized by EC 2-16, "[t]he legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation

for services rendered. . . . " An unjustified, unwarranted distrust of the ethical commitment of the legal profession by those who regulate it -- attorneys themselves -- hardly rises to the level of the type of substantial interest which would justify the content restrictions of either the exclusive list Rule or the anti-solicitation Rule as applied to advertising.

The suggestion that members of the private bar would fail to police attorney advertising misconduct under Rules less content restrictive than DR 2-101(B) and DR 2-104(A) is similarly insubstantial. Again, such suggestion does little more than cast unwarranted doubt upon the collective ethical commitment of members of the bar to protect and "uphold the integrity and honor of their profession and of the

legal system". Bates v. State Bar of Arizona, 433 U.S. at 379. It is in the interest of the private bar to police attorney advertising misconduct, and, "as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust." Id.

The asserted interest of protecting members of the public from their own non-sophistication hardly serves as justification for prohibiting the conveyance of truthful and accurate information through advertising -- any more than it would justify such prohibitions in any other media context. The First Amendment does not assume sophistication on the part of listeners. The First Amendment assumes that only through the flow of unrestricted speech will members of the public acquire the degree of sophistication necessary to

act in their own best interests. Thus, in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 420 U.S. at 770, this Court held invalid a Virginia statute which, like the Rules at issue in this case, wholly precluded the publication of certain information based upon a concern with the public's lack of sophistication, stating:

> There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. * * * But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely

available, that the First Amendment makes for us.

The interest of protecting the public from its own non-sophistication concerning legal services is simply not served by keeping the public ignorant -- particularly where the lack of readily available information concerning legal problems and services is the primary obstacle to the assertion and protection of legal rights. The interest of protecting the public will be best served if more information is made available through non-intrusive public sources such as advertising, not less. Bates v. State Bar of Arizona, 433 U.S. at 375.

Finally, the difficulty which the State has suggested would exist with the enforcement of Rules less restrictive than the exclusive list and anti-solicitation Rules is plainly

insufficient justification for those restrictions. It is disingenuous to assert that application of a simple "false and misleading" standard would in some fashion increase the regulatory burden of enforcement against attorney misconduct, due to the difficulty of verification of the truth of information contained in advertisements. If attorneys were, collectively or individually, predisposed to disseminate inaccurate information through advertising -- which is subject to public view and scrutiny -- the enforcement burden imposed upon the State will not be lessened by advertisement prohibitions. For such attorneys would surely be no less likely to violate ethical obligations in the privacy of their own offices than in the public forum of advertising. See Bates v. State Bar of

Arizona, 443 U.S. at 379. An 'out of sight, out of mind' approach to the regulatory burden of policing attorney misconduct hardly protects the public from the dangers of such misconduct. The desire of the State to decrease its regulatory burden by preserving such an approach is both an insubstantial and inappropriate interest.

The asserted interests for the advertising content prohibitions of DR 2-101(B) and DR 2-104(A) are wholly insufficient. The interest of protecting the public against the dissemination of inaccurate or untruthful information can be best served by simply prohibiting "misleading, false or deceptive" information while permitting the disclosure of any information which will assist members of the public in informed attorney selection. In no

event should Rules which restrict the free flow of information to the public through a medium such as advertising be permitted to stand as an obstacle to the First Amendment rights of those in need of information, based upon unwarranted assumptions as to the ethical commitment of the legal profession.

II. DR 2-101(B) IS FACIALLY OVERBROAD AND SERVES NO GOVERNMENTAL INTEREST.

In this case the Court is presented with yet another First Amendment challenge to a state's exclusive list rule as applied to legal service advertising -- Ohio's DR 2-101(B). The first such challenge arose in Bates, in which this Court held that Arizona's exclusive list rule could not be constitutionally applied to prohibit the inclusion of price information in an advertisement. Subsequently, in In re R.M.J., 455 U.S.

191 (1982), this Court held that Missouri's exclusive list rule could not be applied to prohibit descriptive references to areas of legal practice which differed from those sanctioned by that rule. Although the decisions in Bates and R.M.J. have made clear that legal service advertising is deserving of a significant measure of protection against the type of blanket speech restrictions imposed by exclusive list rules, those decisions have been limited to specific types of advertising information. Thus, the question of the constitutional validity of exclusive list rules has been left for case-by-case determination not only by this Court, but lower courts as well. See, e.g., McLellan v. Mississippi State Bar, 413 So.2d 705 (Miss. 1982) (office hours, date of admission to bar); In re

Appert & Pyle, 315 N.W.2d 204 (Minn. 1981) (advertisement content similar to Dalkon Shield advertisement); Bishop v. Committee on Professional Ethics, 521 F. Supp. 1219 (S.D. Iowa 1981), vacated on other grounds 686 F.2d 1278 (8th Cir. 1982) (racial identity, logos); and Durham v. Brock, 498 F. Supp. 213 (M.D. Tenn. 1980), aff'd 698 F.2d 1219 (6th Cir. 1982) (areas of practice).

Amici believe that exclusive list rules which impose blanket speech prohibitions, without regard to the truth or accuracy of advertising content, are impermissibly overbroad and will continue to generate numerous challenges in the absence of a clearly enunciated standard against which to measure the First Amendment protections afforded to such advertising. We therefore urge the Court, in this case, to take a swifter,

more simple approach and to hold that Ohio's DR 2-101(B) is overbroad and may not constitutionally prohibit the publication of information which is neither false, disceptive, nor misleading.

DR 2-101(B), on its face, is impermissibly overbroad, precluding the dissemination through advertising of virtually every type of noncommercial expression which bears upon the existence and nature of legal rights. The overbreadth of that Rule creates a unique and serious dilemma for those who, but for the Rule's prohibitions, would be the recipients of such information. For unlike an attorney who possesses both the information he wishes to convey and knowledge of the restriction upon his ability to convey it, members of the public are unlikely to

possess either. Under such circumstances, those having a First Amendment right to hear will rarely be in a position to recognize and challege infringements upon that right. Thus, the need to assess the applicability of the overbreadth doctrines arising under the First Amendment is particularly strong where speech prohibitions are purposely designed to prevent the public from receiving all but specified types of information without regard to the truth and accuracy of such information.

In Bates this Court considered the applicability of the 'third party' overbreadth doctrine to advertising -- i.e., that one ought to be permitted to challenge a speech restriction on the qround that it could be unconstitutionally applied to the conduct of another. 433 U.S. at 380. In that case

the Court declined to apply the 'third party' overbreadth doctrine to professional advertising, observing: "[s]ince advertising is linked to commercial well-being, it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation." Id. at 381. However, in Bates the issue presented for review was narrowly drawn to the question of a state's ability to constitutionally prohibit the publication of price information. Id. at 366, 367. Thus, this Court was not called upon the consider the applicability of the third party overbreadth doctrine as it relates to noncommercial speech in advertising. More basically, this Court did not, in Bates, rule upon the applicability of the First Amendment

doctrine of 'facial overbreadth' as it applies to restrictions on advertising.

In Maryland v. Joseph H. Munson Company, __ U.S. __, 52 LW 4875, 4880, n. 13 (June 26, 1984), this Court recognized the distinction between the doctrines of third party overbreadth and facial overbreadth:

> "[O]verbreadth" is not used only to describe the doctrine that allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though "as applied" to him the statute would be constitutional. . . . "Overbreadth" has also been used to describe a challenge to a statute that in all of its applications directly restricts protected First Amendment activity and does not employ means narrowly tailored to serve a compelling governmental interest. . . . Whether that challenge should be called "overbreadth" or simply a "facial" challenge, the point is that there is no reason to limit challenges to case-by-case "as applied" challenges when the statute on its face and therefore in

> all of its applications falls short of constitutional demands.

Ohio's exclusive list Rule, DR 2-101(B), is fatally flawed, not merely because it is capable of being unconstitutionally applied to the protected speech of some, but because it is wholly incapable of any application which would not constitute an infringement of the First Amendment right of free speech.

Unlike the speech restrictions imposed by the false and misleading standard of DR 2-101(A), which are drawn with a large measure of precision to prohibit only non-protected speech, DR 2-101(B) knows no such precision. Although the purpose of DR 2-101(B) is the protection of the public from the receipt of false and misleading information, that Rule does nothing more than prohibit the publication of any

message not expressly permitted by its provisions. The exclusive list Rule does not subject an attorney to disciplinary sanctions for violation of its prohibitions because his speech is false or misleading, as does DR 2-101(A), but merely because he has spoken.

To the extent that DR 2-101(B) is intended to further the State's interest in protecting the public, that Rule adds nothing to the protection already afforded by the false and misleading standard. At best, the prohibitions of Ohio's exclusive list Rule are unnecessary for the protection of the public. At worst, the imprecision of that Rule creates a very real and very unnecessary risk that members of the public will be precluded from receiving protected speech, in violation of their First

Amendment rights to hear, without the knowledge necessary to challenge infringements of those rights. Thus, DR 2-101(B) is facially overbroad and may not withstand First Amendment challenge in this or any case.

III. DR 2-101(A) AND DR 2-101(B)(15), AS APPLIED TO THE DALKON SHIELD ADVERTISEMENT, HAVE AN IMPERMISSIBLE CHILLING EFFECT UPON APPELLANT'S FIRST AMENDMENT RIGHT OF COMMERCIAL SPEECH.

In contrast to the content prohibitions of the exclusive list and anti-solicitation Rules are the requirements of the false and misleading standard and the fee publication Rule, as applied below. Those Rules compel an attorney who advertises that fees are payable on a contingency basis to further disclose specific fee rates and costs related to litigation.

The court below determined that the failure to fully disclose specific contingent fee rates and additional costs in the Dalkon Shield advertisement constitutes a violation of the fee publication requirement of DR 2-101(B). Such omissions also formed the basis of the court's determination that Mr. Zauderer published misleading communications in violation of DR 2-101(A). Those Rules, so applied, operate to impose an unwarranted requirement upon attorneys to disclose specific commercial information about their services prior to the opportunity for assessment of the needs of individual clients.

Such requirements are inappropriate where the legal services described involve more complex areas of law and fact patterns. The more complex the

legal issues involved and the greater the variation in the factual circumstances to which such issues apply, the less able the attorney to determine the amount of time which will be required by a potential client's legal problem and the costs related to that problem, prior to actual discussion. Thus, if an attorney were compelled to disclose, in an advertisement, specific fee rates and to identify specific costs, he or she would be required to do so without the benefit of necessary information. Such a requirement would have a chilling effect upon the attorney's right to disseminate any information, through an advertisement, concerning contingency fee arrangements regardless of the value of such information.[2] Such a restric-

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[2] Those seeking legal services have great concern respecting not only

tion, particularly as applied to the Dalkon Shield advertisement, does not meet the criteria for permissible content regulation of commercial speech as set forth in Central Hudson Gas & Elec. Corp. v. Public Service Comm., supra. Specifically, such a restriction fails to advance a substantial State interest in the least restrictive manner.

A. A Requirement of Disclosure of Specific Fee Information Through Advertising Does Not Further the State's Interest in Protecting the Public from Deceptive Commercial Practices.

The State has a substantial interest in imposing certain restrictions upon the dissemination of legal services

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[2] (continued) the amount of fees, but also how and when fees are to be paid. Recognition of such concern is implicit in DR 2-101(B)(11) which permits attorneys to state merely whether credit arrangements are available.

information where the ultimate harm is likely to be deception of the public about the expense of legal representation. However, a restriction upon the dissemination of information concerning the timing and manner of fee payment (by coupling an attorney's right to disseminate such information with an obligation to further identify specific fee rates and related costs) does not serve the State's interest or the interests of potential clients.

The failure to identify actual contingent fee rates in an advertisement is simply not deceptive or misleading any more than any advertisement for a particular product or service which makes no reference to price could be considered deceptive or misleading. Moreover, a requirement that an attorney disclose fee rates and related costs

prior to any opportunity for assessment of the needs of a particular individual could actually operate to mislead the public in several ways. First, such disclosure may inaccurately convey the impression that there exists no reasonable relationship between the unique needs -- factual and legal -- of a client and the time and expense involved in asserting his legal rights. Second, such disclosure may inaccurately imply that the costs -- other than attorneys fees -- of asserting those rights is so substantial as to dissuade an individual from seeking o[illegible] further information, or ultimately seeking legal representation. Third, a generalized description of the types of potential related costs -- e.g., medical reports, expert witness, long distance telephone charges -- may have little meaning in the absence of

an explanation and discussion as to why such items are necessary and when or whether such expenses will actually arise.

It is not disputed that conveyance of information concerning fee rates and costs is essential in the formation of any attorney-client relationship.[3] However, where the legal services offered relate to non-routine legal problems for which fees and costs may vary significantly as between clients, the physical space limitations of advertising coupled with its nonconversational nature may render it an unsuitable vehicle by which to convey

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3 No evidence was presented in this case which suggests any failure by Mr. Zauderer to disclose his fee rates and potential costs prior to entry into any attorney-client relationship.

meaningful information concerning specific fees and costs.

B. The State's Interest in Protecting the Public From Deceptive Commercial Practices By Attorneys May be Served By Requirements Which Are Less Restrictive Than a Requirement Of Full Disclosure of Legal Fees and Related Costs in an Advertisement.

Even if the state's interests were served by a requirement that contingent fee rates and relates costs be disclosed in advertising which contains a reference to the manner of fee payment, such a requirement is not the least restrictive means of advancing the State's interest. See In re R.M.J., 455 U.S. at 206 (wherein the Court affirmed the application of the "least restrictive means" test to determine the validity of legal service advertising restrictions). If the interest to be

served is to assure that members of the public understand and appreciate the costs involved in legal representation prior to entering into a contractual relationship for legal services, that interest could be equally if not better met in a manner which affords the opportunity both for the attorney to assess the needs of a potential client and the potential client to ask specific questions about the costs involved. Thus, it might be required that advertisements contain a warning that the financial terms and conditions of legal representation have not been fully disclosed and may vary depending upon the specific circumstances of each individual. See Bates v. State Bar of Arizona, 433 U.S. at 384 (wherein this Court stated that warnings or disclaimers might be required). Advertising attorneys could be required to discuss,

without charge, the types of financial commitments which would be involved in connection with their services. Moreover, advertising attorneys could be required to provide written disclosure statements as to costs and fees of particular types of legal representation. Each of these alternatives, alone or in some combination, would assure that potential clients receive adequate disclosure as to fee rates and costs, in the context of their specific legal needs, prior to undertaking a contractual obligation to pay for legal services.

CONCLUSION

The Rules at issue in this case impermissibly restrict advertising in violation of the First Amendment rights of attorneys and members of the public. The prohibitions imposed by those Rules

preclude the conveyance of both commercial and noncommercial information.

Advertising cannot fulfill all of the informational needs of the public. However, it can provide members of the public with "threshold" information necessary for the recognition of legal problems and the identification of a suitable attorney.

The needs of the public will best be served by applying a "false, misleading or deceptive" standard to advertising, giving due regard to both its inherent limitations and the public's recognition of such limitations. Amici respectfully urge this Court to adopt such a standard for the regulation of legal service advertisements.

Respectfully submitted,

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APPENDIX

OHIO CODE OF PROFESSIONAL RESPONSIBILITY,

Canon 2

ETHICAL CONSIDERATIONS

EC 2-1. The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

EC 2-2. The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers

acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment of particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.

EC 2-3. Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of

advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.

EC 2-4. Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers

advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

EC 2-5. A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all

apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laymen should caution them not to attempt to solve individual problems upon the basis of the information contained herein.

EC 2-6. Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7. Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputa-

tions of lawyers are not sufficiently known to enable laymen to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many layment have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.

EC 2-8. Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties--relatives, friends, acquaintances, business associates, or other lawyers. A layman is best served if the recommen-

dation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations.

EC 2-9. The traditional ban against advertising by lawyers, which is subject to certain limited exceptions, is rooted in the public interest. Competitive advertising would encourage extravagant, artful, self-laudatory brashness in seeking business and thus could mislead the layman. Furthermore, it would inevitably produce unrealistice expectations in particular cases and bring about distrust of the law and lawyers. Thus, public confidence in our legal

system would be impaired by such advertisements of professional services. The attorney-client relationship is personal and unique and should not be established as the result of pressures and deceptions. History has demonstrated that public confidence in the legal system is best preserved by strict, self-imposed controls over, rather than by unlimited, advertising.

EC 2-10. Methods of advertising that are subject to the objections stated above should be and are prohibited. However, the Disciplinary Rules recognize the value of giving assistance in the selection process through forms of advertising that furnish identification of a lawyer while avoiding such objections. For example, a lawyer may be identified in the classified section of the telephone

directory, in the office building directory, and on his letterhead and professional card. But at all times the permitted notices should be dignified and accurate.

EC 2-11. The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated as such. For many years some

law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not mislead thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

EC 2-12. A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be

removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC 2-13. In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representations of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC 2-14. In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not

be permitted to hold himself out as a specialist or as having special training or ability, other than in the historically excepted fields of admiralty, trademark, and patent law.

EC 2-15. The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans

which aid in the selection of qualified counsel.

EC 2-16. The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

DR 2-101. Publicity

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories,

city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animnations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm is available to practice, but may

not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

(3) Age;

(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and

memberships in such associations and societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(13) Fee for an initial consultation;

(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether precentages are computed before or after deduction of court costs and expenses;

(16) Hourly rate, provided that the statement discloses that the

total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only, names and addresses of references, and, with their written consent, names of clients regularly represented.

DR 2-103. Recommendation of Professional Employment.

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-104. Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment

resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 3-103(D) (1) through (5), to the extent and

under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistnce organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in ligitation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.